Supreme Court, U.S.
FILED

02 1700 FEB 11 2003

OFFICE OF THE CLERK

Docket No. ____

IN THE SUPREME COURT OF THE UNITED STATES

RODGER L. MCAFEE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Appeal from the United States Court of Appeals
For the 9th Circuit

PETITION FOR WRIT OF CERTIORARI

Rodger L. McAfee, In Propria Persona
P.O. Box 175
El Nido, California 95317
Tel: (559) 486-5795

24 pp

QUESTIONS PRESENTED FOR REVIEW

1. Can the government be equitably estopped from foreclosing if the Court finds that the government engaged in affirmative misconduct?

2. Did the Court of Appeals commit reversible error by affirming the district court's grant of summary judgment when the government intervened in an action and took a monetary setoff from Petitioner's loan account rather than foreclosing on the deed of trust securing the loan in violation of California's One Action Rule?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
STATUES INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF FACTS	2
ARGUMENT	6
EQUITABLE ESTOPPEL	6
ONE ACTION RULE	16
REASONS FOR GRANTING WRIT	19
CONCLUSION	20
PROOF OF SERVICE	

TABLE OF AUTHORITIES

CASES: Page

F.C.I.C. v. Merrill, (1947) 382 U.S. 380 .....7, 11
Heckler v. Comm. Health Serv., (1982) 467 U.S. 51 .....10, 11
I.N.S. v. Hibi, (1973) 414 U.S. 5 8
Miranda v. I.N.S., (1982) 459 U.S. 14 .....10, 11
Montana v. Kennedy, (1961) 366 U.S. 308 .....8, 11
Schweiker v. Hansen, (1981) 450 U.S. 785 .....9, 11
Security Pac. Nat'l Bank v. Wozab (1990) 51 Cal.3d 991 ....17, 18
Walker v. Comm. Bank, 10 Cal. 3d 729.....17, 19
United States of America v. McAfee 12, 13

CODES:

California Code of Civil Procedure §726.....16-17, 20
California Code of Civil Procedure §22.....16

LAW REVIEW ARTICLES:

53 U. Chi. L. Rev. 1026 .....*9*

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the 9th Circuit, reported at 44 Fed. Appx. 223 are reprinted as Appendix A. It affirms judgment of the United States District Court for the Eastern District of California based on a memorandum and order case no. CV F 96-5720 AWI SMS which is reprinted as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the 9th Circuit was entered on August 13, 2002. On September 30, 2002, Petitioner timely filed a petition for rehearing and suggestion for rehearing en banc. The court below entered an order denying the petition on November 14, 2002. This petition is filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgment on petition for certiorari rests upon section 1254(1) of the Judicial Code (28 U.S.C. §1254(1)).

STATUTES INVOLVED

The relevant statutory provisions are the California "One Action Rule" (California Code of Civil Procedure §726, (2002)); Doctrine of Equitable Estoppel; Federal Tort Claims Act (28 U.S.C. §2680(a)(2002)); Federal Rules of Civil Procedure 56(c);

STATEMENT OF THE CASE

In June 1996, the United States brought a suit to foreclose on the following collateral securing the promissory notes that the Petitioner had delivered to FmHA for emergency farm loans totaling $2,075,980: (1) deeds of trust encumbering 1,477 acres in El Nido, California (2) deeds of trust encumbering 405 acres in Kerman, California and (3) security agreements encumbering farm-related equipment.

The United States moved for summary judgment, and Petitioner opposed the motion. The district court referred the case to a magistrate judge for findings and recommendations. As relevant here Petitioner argued that (1) FmHA is equitably estopped from foreclosing on his property; (2) his debt is offset by the losses he incurred due to FmHA's "affirmative misconduct" in administering the loan and supervising the well construction; and (3) California's "One Action Rule" precludes FmHA from foreclosing on his property. The magistrate judge rejected these arguments and recommended that judgment be entered in favor of the United States.

Petitioner challenged the magistrate judges' findings and recommendations. The district court, based on its plenary review of the record and its de novo consideration of the issues, granted summary judgment to the United States.

The Petitioner appealed the district court's decision to the 9th Circuit who subsequently affirmed the district court's ruling.

SUMMARY OF FACTS

Rodger L. McAfee ("Petitioner) and his former wife, Darlene McAfee ("Darlene") purchased 1477 acres of farmland in El Nido, California in 1976 ("El Nido" property). In the following months, the area suffered severe drought and the strata shifted under

Petitioner's land. The six existing wells on the El Nido property failed and were no longer supporting the farm's irrigational needs. To continue farming operations, Petitioner decided to recondition the six existing wells and drill additional wells on the land.

As a result of California's draught, many farmers could not irrigate their land and were therefore unable not produce crops sufficient to sustain farming operations. In response to the draught and pursuant to the 7 U.S.C.S. 1961, Congress allocated funds to assist farmers with well drilling and well reconditioning projects through the Farmers Home Administration (FmHA).

In late 1977, Petitioner and Darlene applied for a FmHA loan under the Act to avoid losing the farm. The application was submitted to the local FmHA office in Merced County for review and was thereafter rejected. Petitioner administratively protested the denial of emergency FmHA funds by appealing to the FmHA's state office.

Upon review of Petitioner's appeal, the state director for FmHA (Mr. Lowell A. Panell) concluded that the denial of emergency funds was politically motivated and thereafter overturned Petitioner's initial denial of emergency funds. (It is important to note that during the 1960's and 70's, Petitioner was a committed political activist. Petitioner was highly active in many social movements, primarily those aimed at giving farm workers the opportunity to prosper from the fruits of their labor. For example, Petitioner was a strong supporter of the United Farm Workers movement and held close ties with Cesar Chavez. However, because Petitioner actively supported the farm worker's movement, the local FmHA officials viewed Petitioner with disgust. The local FmHA official labeled Petitioner a "Communist" and accused him of being a member of the Communist Party.)

In 1978, the state FmHA official reviewed Petitioner's appli-

cation and subsequently approved Petitioner's application, reversing the local FmHA agent's decision. News of the reversal infuriated the local agent; increasing the animosity he felt toward Petitioner. This troubled Petitioner, particularly since the local FmHA agent was put in charge of disbursing the emergency funds. Petitioner was extremely concerned and fearful that FmHA would somehow sabotage the well drilling project. Accordingly, Petitioner contacted the state director to protest the local FmHA offices' authority in disbursing the funds. Despite Petitioner's opposition, the state director advised Petitioner that local FmHA agents were required to oversee disbursement of FmHA emergency funds.

Shortly thereafter, the local FmHA agent notified Petitioner that he must put up security before disbursement of the emergency funds. Petitioner and Darlene signed a security agreement and thereafter executed a deed of trust for the El Nido property. However, FmHA advised Petitioner that the government required additional security and thereafter required Petitioner to encumber his family's 405acre ranch in Kerman, California ("Kerman Property") and other farm related equipment to secure the emergency funds. Petitioner and Darlene executed a deed of trust pertaining to the Kerman property.

Upon securing the emergency funds, FmHA's local agent began disbursing portions of the funds to pay-off Petitioner's existing debt at that time, which was completely unrelated to the drilling project. Petitioner complained that the emergency funds were being ill spent and should be used exclusively for the well reconditioning and drilling project. FmHA warned Petitioner to stay out of the way and not to interfere with the project.

In April 1978, FmHA entered into a contract with the Water Development Corporation ("WDC") to perform the well drilling and well reconditioning project on the El Nido property. WDC immediately commenced work on reconditioning the existing wells,

however WDC failed to consult with FmHA's state engineer, Erwin Hofmann ("Mr. Hofmann") to obtain the necessary design plan to ensure a successful well drilling project. By the time Mr. Hofmann evaluated the well construction project in December 1978, the construction project was substantially underway. At that time, Mr. Hofmann made some recommendations to ensure successful farming operations upon completion of the project. The local FmHA agent disregarded Mr. Hofmann's recommendations and allowed WDC to continue drilling as previously planned.

By January 1979, it became clear that Petitioner would not have enough funds to complete the project and would require additional financing for the project to succeed. Petitioner became extremely distressed with the way FmHA had spent the emergency funds and became further distressed upon learning the project was going to fail without securing additional emergency funds.

In the spring of 1979, Petitioner was admitted into the Brite Institute after experiencing a complete mental and psychological breakdown. From this point forward, Petitioner no longer participated in the project and moreover, did not approve of FmHA's disbursement of the funds. As a result, Darlene was left alone to deal with Mr. Dent who thereafter pressured her to approve and sign off on the well drilling project. Petitioner did not have a qualified representative to approve the well drilling work.

By the time Petitioner was released from the Brite Institute, the loan proceeds had been exhausted and the project was completely abandoned. FmHA had spent over $2 million on the project yet disbursed less than ten percent (10%) of the proceeds on the actual drilling project. In the end, Petitioner was left with eight non-functioning wells and the complete failure of his farming operations.

In 1981, FmHA served the first of its Notices of Foreclosure on Petitioner. Petitioner retained counsel and later entered into a

stipulation with FmHA to suspend foreclosure proceedings until the completion of an investigation initiated by members of United States Congress through the Office of the Inspector General.

In 1983, Petitioner's children filed suit against Petitioner for wrongfully encumbering the Kerman property as security in obtaining the emergency funds. According to Petitioner's children, the property was to be held in trust and that Petitioner did not have the authority to use the property as security for the emergency funds.

The government intervened in the action (McAfee v. McAfee) instead of foreclosing on the deeds of trust Petitioner had pledged as security for the loans. The government settled with Petitioner's children then renegotiated its' security interest in the parcel to bolster its' own financial position. The government then took a monetary set-off against Petitioner's loan account without first foreclosing on the deeds of trust securing the loan in violation of California's "One-Action rule".

ARGUMENT

I. EQUITABLE ESTOPPEL

A. AFFIRMATIVE MISCONDUCT

The doctrine of equitable estoppel is warranted when a government employee conducts him/herself in a manner that intentionally or recklessly deprives an individual from a benefit that otherwise would have been available absent the official's affirmative misconduct. There have been a number of cases reviewed by this Court whereby a government official's conduct has been examined to determine when equitable estoppel is appropriate against the government due to the "affirmative misconduct" of its agent. And in each case, the Court has ruled that the government employee's conduct did not rise to the level whereby the doctrine should apply.

Understandably, this Court has a number of considerations to ponder in determining whether conduct by a government employee triggers equitable estoppel against the government. Protection of the public fisc and separation of powers are two such considerations. However, not least of the Court's considerations is the preservation of public confidence in its government officials. When an individual is treated the way Petitioner was treated, with the initial denial of emergency funds, then repeated threats of foreclosure and actual physical harm, a finding of affirmative misconduct must be made to prevent future harm and to restore the public's faith in our government officials. Recently, there has been growing public sentiment to bring a stop to "improper" conduct by government and corporate leaders. This citizens of this country want our governmental officials to be held accountable for their actions and this Court must do what is necessary to effect accountability in our government.

This Court has yet to find a case where a governmental official's conduct arose to a level that can be termed "affirmative misconduct". In every case, the official's misconduct did not trigger equitable estoppel and the government was not liable for the employee's actions.

In the present case, however, the actions taken by FmHA against Petitioner were so gross and malicious; the doctrine of equitable estoppel must apply against the government. As Petitioner will show, the level of affirmative misconduct he endured was significantly greater than those previously reviewed by the Court. Petitioner can be set apart from previous Supreme Court cases involving equitable estoppel against the government and shall distinguish his case from those previously reviewed by this Court.

In *Federal Crop Ins. Corp. v. Merrill*, (1947) 332 U.S. 380, two farmers had relied on a government agent's promise that their

entire wheat crop would be federally insured. Unbeknownst to the farmers and the agent, regulations had recently been changed by the FCIC whereby insurance for a portion of the crop was prohibited.

Later, when a draught had destroyed the wheat, the farmers sought to recover from their policy, but the FCIC refused to pay pursuant to the new regulations.

The Merrills brought suit against the government and argued that the government should be estopped from asserting the newly implemented regulations as a defense. The Court held that estoppel was unwarranted in the case. According to the Court, the farmers were presumed to know the content of FCIC regulations regardless of the "hardship resulting from innocent ignorance " id. at 385.

In *Montana v. Kennedy*, (1961) 366 U.S. 308, an alien sought to estop the government from asserting his lack of citizenship as grounds for deportation. The alien argued that he would have been born in America had his mother, a U.S. citizen, not been denied a passport to return to the United States by the immigration officer who mistakenly interpreted a federal statute as prohibiting her from entering the United States without a passport. The Court refused to apply estoppel to the government since the official's "well meant advice" fell "far short of misconduct such as might prevent the United States from relying on petitioner's foreign birth" id. at 314-15.

In *I.N.S. v. Hibi*, (1973) 414 U.S. 5, the Court again reviewed a government's actions for purposes of determining whether equitable estoppel will lie against the government. In Hibi, a foreign national sought to estop the government from asserting a statutory deadline for applying for citizenship against him, arguing that the government neither informed him of his right to apply nor stationed nationalization officials in his country during the applicable statutory period.

The Court held that the government could not be estopped because failure to publicize rights or station officials in a foreign country did not amount to "affirmative misconduct." id. at 8-9. Moreover, the Court reasoned that Hibi's "effort to claim naturalization under a statute, which by its terms had expired more than 20 years before he filed his lawsuit, must fail" id. at 9.

The Court took another look at governmental affirmative misconduct when it reviewed *Schweiker v. Hansen*, (1981) 450 U.S. 785. In *Hansen*, the plaintiff tried to estop the government from enforcing a regulation that required potential beneficiaries under the Social Security Act to file written applications in order to qualify for certain insurance benefits. Although plaintiff would have been eligible to obtain these benefits had she filed the required application, the plaintiff failed to qualify because a government field agent, who mistakenly believed that the plaintiff was ineligible, instructed her not to apply.

The lower court ruled that the government should be estopped and that plaintiff should be compensated for the insurance benefits she otherwise would have been qualified to receive. Upon review by the Supreme Court, the Court refused to adopt the lower court's analysis which suggested that it was "more appropriate to estop the government when a procedural requirement had been asserted than when a substantive requirement was involved" *53 U. Chi. L. Rev. 1026* at 1032. The Court further reasoned that the conduct of petitioner's field representative, in erroneously informing respondent that she was not entitled to the benefits and in negligently disregarding petitioner's Claims Manual by failing to recommend that respondent file a written application, did not amount to affirmative misconduct. The government was again absolved of any liability due to the actions of its' agent. The Court, however, did provide some insight into how the elements of private estoppel might apply against the government by suggesting that reliance upon oral

representations of government officials might be per se unreasonable" *Hansen* at 788.

The following year, the Supreme Court expanded on Hansen upon review of *Miranda v. I.N.S*, (1982) 459 U.S. 14. In *Miranda*, petitioner attempted to estop the government based on its long delay in processing a permanent residency petition. The Ninth Circuit narrowly construed Hansen to apply only in cases involving the expenditure of public funds and held that estoppel was appropriate against the government. The Supreme Court reversed the Ninth Circuit's ruling by expressly rejecting the court's narrow reading of Hansen. The Court held that mere delay was not affirmative misconduct and that public funds were not the only area "of broad public concern that prevented estoppel against the government" id. at 19. The Court did not decide whether affirmative misconduct in a particular case would estop the government from enforcing the immigration laws, however it did hold that proof that petitioner failed to process promptly an application fell far short of establishing such conduct necessary to estop the government.

Two years later, the Court again examined the doctrine of equitable estoppel in *Heckler v. Community Health Services, Inc.*, (1984) 467 U.S. 51. In Heckler, a company called Community Health Services (CHS) participated in the Medicare and CETA programs. CHS was reimbursed for the costs of services provided to Medicare recipients, but was doubly reimbursed for some specific operating expenses because of overlap between the two programs. Government regulations prevented this double recovery unless the CETA funds were used as "seed money" for new health care agencies or for expanded services at existing agencies. CHS's fiscal intermediary, a private party acting on behalf of the government, orally informed CHS that these particular CETA funds fell within the seed money exception. CHS relied on this advice to expand its services and requested reimbursements from the government while continuing to receive CETA grants. When the Health and Human

Services Department later ruled that CETA grants were not seed money, CHS sought to block recovery of the funds by estopping the government from asserting its interpretation of the regulation in an action against CHS.

The Third Circuit agreed with CHS's argument and estopped the government. However, the Supreme Court unanimously reversed the Third Circuit, holding that CHS failed to establish the requisite elements of private estoppel. In addition, the Court ruled that CHS could not rely on the agent's erroneous statement regarding the regulations to trigger estoppel against the government. id. at 60-61. However, the Court refused to hold that the government could never be estopped, stating that there could be some case in which "the public interest would require it" id. at 60.

In examining the previous equitable estoppel cases reviewed by the Supreme Court, it is clear the Petitioner suffered a greater level of misconduct at the hands of a government employee. Petitioner was not simply given "bad advice" as in *Merrill* and *Montana*; or "erroneous information" as in *Hansen*; or the victim of "long delay" as in Miranda. Petitioner was the victim of a government official's malicious and gross desire to take revenge upon a "Communist", as viewed by the local FmHA official. FmHA knew or should have known that Petitioner was engaged in conduct protected by the First Amendment of the U.S. Constitution. Petitioner was exercising his constitutional rights and should not have been retaliated against for supporting the social movements at the time.

The government's agent did not like Petitioner actively supporting the social movements and sought revenge for Petitioner's protected conduct. The Court has not reviewed a case where equitable estoppel should apply more than in the present case. To begin, Petitioner's initial request for help were denied because of the government official's dislike of Petitioner. Secondly, the funds were negligently spent to purposely decrease the amount of funds

that would go to the well drilling and reconditioning project to make it unsuccessful. Third, FmHA threatened Petitioner with fore-warnings of physical harm and bodily injury if Petitioner continued protesting FmHA's disbursement of the emergency funds. Fourth, FmHA made the determination that the well depth would not exceed 420' even though FmHA knew that water would not be available at that depth. Fifth, FmHA caused Petitioner to suffer severe emotional and mental distress such that he required admittance into the Brite Institute for immediate treatment. Sixth, while Petitioner was seeking treatment, FmHA forced Petitioner's ex-wife to approve and sign off on the loan disbursements even though she had no knowledge or expertise in the endeavor. Seventh, while the local FmHA agent was engaged in obtaining approval from Petitioner's ex-wife, the government agent initiated extra-marital relations with Petitioner's then wife while Petitioner was away receiving treatment for the mental breakdown he had suffered.

The level of misconduct exercised by the local FmHA agent is so egregious; it completely overshadows the government's level of misconduct previous reviewed by this Court in equitable estoppel cases. The malicious actions that FmHA took to bring about the foreclosure proceedings against Petitioner must move this Court for a determination that equitable estoppel should apply against the government.

In examining the lower court's opinion on governmental affirmative misconduct, the Ninth Circuit ignored many essential facts that would have led to the appropriate application of equitable estoppel.

The Ninth Circuit held that Petitioner's reliance on FmHA letters to prove the project was going to fail "was mere speculation, not a reasonable inference drawn from evidence." (*United States of America v. Rodger L. McAfee*, Case no. 00-17334, 9th Cir. 2002) The letters were from FmHA's own expert, Irwin Hofmann, which foretold of the project's failure if the well depth stayed at 420' as

unilaterally decided by Mr. Dent. The lower court's reasoning completely ignored Hofmanm's skill, knowledge and expertise in well drilling projects. Moreover, the Ninth Circuit failed to consider any evidence Petitioner presented to the Court.

Petitioner provides the ideal occasion whereby equitable estoppel should apply against the government. The local FmHA agent's conduct in misspending the funds and the eventual demise of Petitioner's drilling project was done with the intent and purpose to doom Petitioner's farming operation. FmHA recklessly and intentionally misspent the emergency funds and left Petitioner in a worse predicament than before he sought emergency relief. Prior to receiving the funds, Petitioner had six non-functioning wells and a mortgage on the property. After receiving the funds, Petitioner was left with eight non-functioning wells, a mortgage on the property plus an additional $2 million debt that the government is seeking to recover.

B. SERIOUS INJUSTICE WITHOUT PUBLIC HARM

The Ninth Circuit reasoned that there was no clear evidence of "serious injustice" because Petitioner was in "disastrous financial circumstances... prior to the FmHA loan" and that Petitioner "used far more of his loan money to pay existing debts that he used to pursue his drilling project". (*U.S.A. v. McAfee*, Case no. 00-17334, 9th Cir. 2002) The Ninth Circuit also held that Petitioner was able to keep his property nearly 20 years longer that would otherwise been the case.

Petitioner may have used his loan money to pay existing debt, however, the Ninth Circuit and the district court missed the point of the loan and the well drilling project. The loan and project was established to help Petitioner recover from the disastrous drought of the 1970's. Petitioner needed the emergency funds to drill productive wells, irrigate the land, produce crops and eventual-

ly pay back FmHA's emergency funds. Through the local FmHA official's conduct, the government set up Petitioner for the eventual failure of his farm by digging non-producing wells and negligently spending the emergency funds. The government's own expert warned that there would not be any water found at the level the government wanted to dig the wells. Mr. Hofmann advised the local FmHA official that the wells would have to be between 800' to 1100' deep to achieve an adequate water supply sufficient to farm the 1477 acres.

The fact that the Petitioner has maintained possession of his property for over 20 years without foreclosure supports Petitioner's argument that the government has engaged in affirmative misconduct. The only party benefiting from this bureaucratic nightmare is the government. Interest on the loan has been accruing over the last twenty years whereby the government now contends Petitioner owes the government over $5 million. Therefore, despite the Ninth Circuit's contention, the government is the only party that has benefited from FmHA's affirmative misconduct.

The government is to blame for the unsuccessful drilling project. The government was determined to see Petitioner fail and intentionally misspent the funds so Petitioner could not successfully resume farming operations.

Furthermore, if the government were truly concerned about the public fisc, as alleged by the Ninth Circuit, the government would not have waited twenty years to foreclose on the property.

The government is attempting to foreclose on land in El Nido, Ca. and in Kerman, Ca. belonging to a farmer who initially looked to the government for help to save his farm. It is clear from the record that the local FmHA official did not want to help Petitioner save his farm. Petitioner testified that his initial request for emergency assistance was denied. Many farmers in the area

were provided relief from the government to help save their farms. In fact, the government granted millions of dollars to help farmers dig wells deep enough to produce irrigation water. However, when Petitioner requested such assistance, he was denied any help. Petitioner took it upon himself to go over the head of the local FmHA officials and requested help directly from FmHA's state director.

Through Petitioner's persistence, his request for emergency funding was granted. However, the funds were to be disbursed by the local FmHA office; the same office that continually denied Petitioner's requests for aid. This is akin to putting the fox in charge of the hen house. Mr. Dent's decision to deny Petitioner's emergency aid had been overturned by the state director. Mr. Dent resented Petitioner and vowed to do everything in his power to see Petitioner fail. Mr. Dent procured the well drillers for Petitioner's farm and had given strict orders not to dig deeper than 420'. Despite the expert opinions from Mr. Hofmann, Mr. Dent advised the well drillers to stop digging at a level that would produce no water. Mr. Dent was setting Petitioner up for the inevitable failure of the farm, the inability to re-pay the loans and the eventual foreclosure of the 1477 acres in El Nido, California.

There will be no harm to the public in allowing Petitioner to keep his land. In fact, Petitioner has dedicated the entire 1477 acres to Our Land Corporation, a non-profit land conservancy organization whose purpose is to help families support themselves through farming and agriculture related businesses. The entire 1477 acres in El Nido, Ca. will be divided among several families who will be taught the best methods for farming and will be provided the equipment and materials necessary to build and maintain successful farming operations.

Petitioner contends that the 1477 acres will best serve the public if they are committed to the land conservancy where families

can utilize the land, earn a living and stimulate the local economy. The public can benefit much more through the productive use of the land rather than allowing the land to be controlled by the ineffective and bureaucratic agency that has allowed this land to remain useless and idle for the past 20 years.

II. ONE ACTION RULE (C.C.P. § 726)

A. MULTIPLE ACTIONS

California Civil Procedure Code §22 defines an action as "an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." (C.C.P. §726)

In 1983, the government intervened in an action between the Petitioner and Petitioner's children whereby Petitioner's children were suing to enforce their interest in the Kerman property. The land became encumbered when the government required additional collateral on top of the El Nido property. Petitioner used the Kerman property as secondary collateral in order to obtain the necessary emergency funds. The Kerman property was being held in trust whereby Petitioner's children were named as beneficiaries of the trust.

The government has stated that when it intervened in the action McAfee v. McAfee, the government was protecting its' interest in the encumbered property "to prevent the suit from extinguishing or diminishing its security interest in the Kerman property."

The government's intervention in the action to "protect its' interest" [emphasis added] qualifies as an action as defined by C.C.P. §22. Furthermore, C.C.P. §726 states that "There can be but one form of action for the recovery of any debt or the enforcement

of any right secured by mortgage upon real property or an estate for years therein, which action shall be in accordance with the provisions of this chapter." In this case, the government has initiated multiple actions in its attempt to foreclose against the El Nido property, including the intervention in 1983. However, the government has carefully characterized the intervention as an attempt to "protect its interest" and not an "action" so as not to violate the one action rule.

Moreover, the government also violated the "security first" aspect of the One-Action Rule as articulated in *Security Pac. Nat'l Bank v. Wozab,* (Cal. 1990) 51 Ca. 3d 991. Upon intervening in the McAfee v. McAfee action, the government settled with the children by taking a quasi-personal judgment against Petitioner's children in the amount of $500,000 and thereafter took a setoff on Petitioner's loan account without foreclosing on the deeds of trust. When a secured creditor obtains judgment on the debt before foreclosing the security, he is deemed to have waived the security. This is the "sanction" aspect of section 726, *Walker v. Community Bank*, (Cal. 1974) 10 Cal. 3d 729. Under these authorities, the government must lose the security as a "sanction" because it took a monetary setoff before exhausting the security.

B. SET OFF

The Ninth Circuit Court held that the settlement between Petitioner's children and the government was not a "setoff" against Petitioner. The Court defined a setoff as being an "extrajudicial appropriation of the debtor's assets before foreclosure".

Extrajudicial is defined as "that which is done outside of a court's jurisdiction; not founded upon or dependent upon the authority of a court." In this case, there was a settlement that was reached outside of court between the government and the children.

Appropriation is defined as "to set apart for or assign to a particular purpose or use in exclusion of all others."

In this case, the government set apart the value of the Kerman property for the particular purpose of securing the repayment of the El Nido emergency loan. This was done outside of the court's jurisdiction and without foreclosing on the security for the emergency funds.

C. DEBTOR'S ASSETS

In its opinion, the 9th circuit ruled that Petitioner had no propriety interest in the KERMAN property

An asset is defined as anything owned that has monetary value; any interest in real property or personal property that can be used for payment of debts." Here, the Court allowed Petitioner to use the Kerman property as a secondary collateral source for the El Nido emergency loan. During the appellate hearing, the government conceded the fact that Petitioner had a financial interest in the KERMAN property.

When the government extinguished the children's rights to the property, the government also extinguished Petitioner's interest. Petitioner had an interest in the Kerman property. The court's allowed him to use it as collateral to pay back a debt.

Due to the foregoing, the government is in fact initiating multiple actions in its attempt to foreclose on the El Nido property after its' action against the Kerman property. The government has violated the "security first" component by releasing its security interest against Petitioner and taking a "set-off" against Petitioner's account instead of foreclosing on the property. *Security Pac. Nat'l Bank v. Wozab*, (Cal. 1990) 51 Cal. 3d 991; *Walker v. Community Bank*, (Cal. 1974) 10 Cal. 3d. 729.

REASONS FOR GRANTING WRIT

This Court should grant petitioner's writ of certiorari due to the exceptional circumstances involved in the case that warrant further review. Moreover, the relief Petitioner seeks cannot be obtained in any other form or from any other court.

A. EQUITABLE ESTOPPEL SHOULD APPLY

The issue involved in this case is not new for the U.S. Supreme Court. Over the years, the question whether to allow a citizen to estop the government due to a governmental official's conduct has been reviewed many times by this Court. And in each case, the official's conduct did not rise to the level where the government should be equitably estopped. In the present case, however, the level of government misconduct far exceeds those previously reviewed. The time has arrived for the Court to revisit the issue of "affirmative misconduct" such that the doctrine of equitable estoppel should apply.

Although the Supreme Court has repeatedly reversed lower court decisions estopping the government, it has refused to rule out the possibility that the government might be estopped in some case. Yet the Court has refused to indicate what the appropriate case would be. Petitioner provides the appropriate circumstances where the government's action has triggered the application of equitable estoppel.

Moreover, cases where the government engaged in intentional or reckless misconduct require the Court to apply the doctrine to preserve public confidence in the government. Citizens are entitled to expect that their government will not engage in gross misconduct against them. The public is keenly interested in maintaining decency, honor and reliability in their government officials and

are waiting for the Court to hold the government accountable for the wrongful acts of its' officials.

B. CALIFORNIA'S ONE-ACTION RULE HAS BEEN VIOLATED

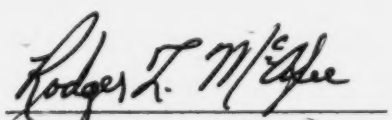
Under California law, a creditor must rely upon his security before enforcing the debt. Moreover, the law requires a secured creditor to proceed against the security before enforcing the underlying debt.

In the present case, the government did not follow the procedures set forth in Cal. Civ. Procedure Code §726 and must therefore be precluded from foreclosing on Petitioner's land. The lower courts failed to recognize the government's violation of California's "One-Action" and "Security First" rules. Petitioner therefore seeks relief from this Court to review the lower court's decision and prevent further injustice against Petitioner.

CONCLUSION

The judgment of the Ninth Circuit Court should be reversed.

Respectfully submitted:



Rodger L. McAfee
Petitioner, In Propria Persona

Supreme Court, U.S.
FILED

02 1700 FEB 11 2003

OFFICE OF THE CLERK

No. 02-

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2002

RODGER L. MCAFEE,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Appeal from the United States Court of Appeals
for the 9th Circuit

APPENDIX TO THE

PETITION FOR WRIT OF CERTIORARI

Rodger L. McAfee, In Propria Persona
P.O. Box 175
El Nido, California 95317
Tel: (559) 486-5795

39 pp

APPENDIX

Title	Date	Page
Memorandum Opinion and Order Re Motion for Summary Judgement - U.S. District Court for the Eastern District of California.	9/27/00	1-26
Memorandum of Appeal	8/13/02	27-34
Order from U.S. Court of Appeals for the Ninth Circuit re Appellant's Petition for Rehearing.	11/14/02	37

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	
Plaintiff,	**CV F 96-5720 AWI SMS** MEMORANDUM OPINION AND ORDER RE MOTION FOR SUMMARY JUDGMENT [Doc. 82)
v.	
RODGER L. MCAFEE, et al.,	
Defendants	

This is an action for judicial foreclosure on real estate deeds of trust and chattel security. Pending before the court is a motion for summary judgment brought by Plaintiff United States of America. The court has federal question subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1345 and venue is proper in this district.

PROCEDURAL HISTORY

Plaintiff the United States filed its motion for summary judgment on November 29, 1999. Defendant Rodger L. McAfee filed an opposition on January 21, 2000, and the United States filed a reply on February 7, 2000. The matter was referred to Magistrate Judge Sandra M. Snyder for findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72-302.

Magistrate Judge Snyder entered findings and recommendations on the United States' motion for summary judgment on April 21, 2000. These findings and recommendations were served on the parties and contained notice to the parties that any objections to the findings and recommendations were to be filed and served

within ten court days. The findings and recommendations further provided that replies to the objections were to be filed and served within ten court days after service of the objections.

The United States filed objections to the findings and recommendations on May 5, 2000. Rodger McAfee filed objections to the findings and recommendations on May 11, 2000. The United States filed a reply to Rodger McAfee's objections on May 25, 2000. Rodger McAfee filed objections and a request to strike the United States' reply on June 1, 2000. The United States filed a response on June 5, 2000.

In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C) this court has conducted a de novo review of this case.

BACKGROUND

The joint scheduling conference statement filed by the parties on March 25, 1998, sets forth a factual summary of this case, which includes the following:

> The United States of America is seeking to foreclose on certain deeds of trust encumbering certain real property located in El Nido, Merced County, California and on its perfected security interest on certain personal property. The deeds of trust and security interests were executed and delivered to the FSA (then the Farmers Home Administration) by Rodger McAfee and his wife Darlene M. McAfee aka Darlene Madelaine McAfee nka Darlene M. Blackwood (jointly referred to as "McAfees") as security for repayment of five emergency farm loans made to the McAfees in 1979 in the aggregate principal amount of two million, seventy-five thousand, nine hundred eighty dollars ($2,075,980) and one additional emergency farm loan made to the McAfees by FSA in 1980 in the principal amount of thirty-five thousand dollars ($35,000).

McAfee admits executing all the promissory notes described

in the complaint, except the $35,000 promissory note. He also admits executing all the deeds of trust and security agreements except the one marked as Exhibit "I".

Joint Scheduling Conference Statement filed March 25, 1998, 1:22 - 2:10.

LEGAL STANDARD

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Poller v. Columbia Broadcast System, 368 U.S. 464, 467 (1962); Jung v. FMC Corp., 755 F.2d 708, 710 (9th Cir. 1985); Loehr v. Ventura County Community College Dist., 743 F.2d 1310, 1313 (9th Cir. 1984).

> Under summary judgment practice, the moving party [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). [W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file'" Id. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court

demonstrates that the standard for entry of summary judgments, as set forth in Rule 56(c), is satisfied." Id. at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968); Ruffin v. County of Los Angeles, 607 F.2d 1276, 1280 (9th Cir. 1979), cert. Denied, 455 U.S. 951 (1980).

In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the mere allegations or denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exits. Rule 56(e); Matsushita, 475 U.S. at 586 n.11; First Nat'l Bank, 391 U.S. at 289; Strong v. France, 474 F.2d 747, 749 (9th Cir. 1973). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 248 (1986); T.W. Elec., Inc. v. Pacific Elec Contractors Ass'n., 809 F.2d 626,630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, Anderson, 477 U.S. 248-49; Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." First Nat'l Bank, 391 U.S. SY 290; T.W. Elec. Serv., 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'piece the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments); International Union of Bricklayers v. Martin Jaska, Inc., 572 F.2d 1401, 1405 (9th Cir. 1985).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c); Poller, 368 U.S. at 468; SEC v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th Cir. 1982). The evidence of the opposing party is to be believed. Anderson, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, Matsushita, 475 U.S. at 587 (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)(per curiam); Abramson v. University of Hawaii 594 F.2d 202, 208 (9th Cir. 1979). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts... Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (citation omitted).

DISCUSSION

United States' Objections

In its objections, the United States addresses two findings of the Magistrate Judge.

The first is that, "[t]he United States' motion for summary judgment is generated in response to McAfee's affirmative defenses set forth in his amended answer filed August 3, 1998." Findings and Recommendations, 4:14-16. The second is that, "the United States has not addressed McAfee's first [failure to state a claim], tenth [fraud], eleventh [unclean hands], thirteenth [due process], fourteenth [assumption of the risk], and fifteenth [regulatory section] affirmative defenses." Findings and

Recommendations, 21:2-4. The United States argues that the court should not grant it summary judgment, because Rodger McAfee abandoned those affirmative defenses by not raising them in opposition to the summary judgment motion. The United States cited United Mine Workers of America v. Pittson Company, et al., 984 F.2d 469, 478 (D.C. Cir. 1993), in which the court held as follows:

> In addition, Raul argues that it did not raise other affirmative defenses at the summary judgment stage because those defenses required discovery to develop. As a general rule, though, the failure to raise an affirmative defense in opposition to a motion for summary judgment constitutes an abandonment of the defense. See, e.g., Attorney General of United States v, Irish People, Inc., 595 F.Supp. 114, 120 n. 9 (D.D.C. 1984) (affirmative defenses abandoned when not raised at summary judgment stage), aff'd in part and rev'd in part on other grounds, 796 F.2d 520 (D.C. Cir. 1986); Pantry Inc. v. Stop-N-Go Foods, Inc., 796 F.Supp. 1164, 1167-68 (S.D. Ind. 1992) ("[t]his court knows of no authority for holding that affirmative defenses are somehow latent and survive a partial summary judgment to be argued at trial - even though the complete issue of liability has been determined."). Thus, we affirm the District Court's holding that Rawl abandoned its affirmative defenses by not raising them prior to summary judgment.

The court finds that in the present case, Rodger McAfee has abandoned all of his affirmative defenses not raised in opposition to the United States' motion for summary judgment.

On the issue of what relief it sought, the United States correctly argues that in its Memorandum in Support of Motion for Summary Judgment it stated that, "The United States requests that summary judgment be granted in its favor for the reasons that there is no genuine dispute as to a material fact and that the United States is entitled to a judgment as to each of the causes of action of its Complaint for Judicial Foreclosure." Memorandum

in Support of Motion for Summary Judgment, 1:20-24. Further, the United States quoted the following language from U.S. v. Anthony, 1986 WL 10278 at *1 (S.D.N.Y. 1986): "To establish a right to foreclose on the mortgage, the Government need only show that money was advanced to the mortgagor; that the note and mortgage were executed as security in conjunction with the loan; that both were recorded prior to the recording of any other interests; and that the mortgagor has defaulted.

In response, Rodger McAfee argues in his objections to the findings and recommendations, citing Katz v. Children's Hosp. of Orange Count, 28 F.3d 1520, 1534 (9th Cir. 1994), that a party seeking summary judgment is required to inform the court and the opposing party of the specific grounds for its motion, which must be set forth in the moving party's notice of motion. In Katz, the Ninth Circuit explained as follows:

> A party can only beheld to have failed to satisfy its duty under Celotex to "designate 'specific facts showing that there is a genuine issue for trial,'" Celotex v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed. 2d 265 (1986) (quoting Fed.R.Civ.Pro. 56(e)), however, if the moving party placed the nonmoving party on proper notice. "Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion." Id. at 323, 106 S.Ct. at 2552 (emphasis added); see also USA Petroleum, 13 F.3d at 1279, 1283 & n. 8 (citing cases); cf. Fountain v. Filson, 336 U.S. 681, 682-83, 69 S.Ct. 754, 755, 93 L.Ed. 971 (1949) (holding that an appellate court can grant summary judgment sua sponte against a party as long as that party had a full and fair opportunity to contest the issue).

The Ninth Circuit found that nothing in the moving party's "summary judgment motion" or its codefendant's motion to dismiss, or "the additional briefs filed by either party," put the non-moving party on notice that he was required to adduce a certain set of facts. The Ninth Circuit concluded, because the appellant was not

on proper notice, that it could not uphold the district court's grant of summary judgment on the basis urged by the appellee. Contrary to Rodger McAfee's assertion, however, Katz contains no suggestion that the required notice to the non-moving party must be contained in the notice of motion. To the contrary, the Ninth Circuit refers to the motion itself, the codefendant's motion to dismiss and/or "the additional briefs filed by either party." The court finds, therefore, that there is no merit to Rodger McAfee's argument that a moving party must provide the required notice of the specific grounds for its motion for summary judgment in its notice of motion.

Rodger McAfee also argues that the United States' motion for summary judgment affirmatively raises five issues, which were specifically directed at ten designated affirmative defenses. Rodger McAfee contends that the United States therefore did not place him on notice that all arguments and evidence opposing a finding of liability had to be presented, citing Pantry, Inc. v. Stop-N-Go Foods, Inc., 769 F.Supp. 1164, 1167 (S.D.Ind. 1992). The Stop-N-Go Foods case, however, provides no support for Rodger McAfee's argument. On reconsideration of the granting of partial summary judgment, the court explained that partial summary judgment on the issue of liability precluded the non-moving party from subsequently litigating affirmative defenses. The court explained as follows:

> Given the scope of that Summary Judgment Order, Stop-N-Go's argument regarding the continuing viability of its defenses to liability is without merit. When a party moves for a summary judgment of the issue of liability, the non-movant is thereby placed on notice that all arguments and evidence opposing a finding of liability must be presented to properly resolve that issue. Whether a defense counters directly the elements of a claim or otherwise excuses liability (i.e. an affirmative defense), it must be presented and supported when the embracing issue of "liability" is considered for judgment. A summary judgment on the issue of liability encompasses all affirmative defenses and implicitly challenges the non-movant to

establish a basis for finding that the defenses are both applicable and supported by the sufficient facts. [FN2]

FN2. This conclusion is supported by the legal principle that a court cannot enter a "judgment" regarding sub-issues of liability but may enter a "judgment" regarding the complete issue of liability only. Fed.R.Civ.P. 56(c); 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, FEDERAL PRACTICE AND PROCEDURES 2736 (1983). A court may move "sham" or uncontested sub-issues from consideration under the authority provided by Rule 56(e); however, that was not the kind of relief requested in The Pantry's Motion.

Stop-N-Go argued that a "plaintiff must demonstrate in the motion for summary judgment that there is no material fact in issue as to the defendant's affirmative defenses and that those defenses are insufficient as a matter of law." (Defs.' Br.Supp.Mot.Recons. at 4.) A plaintiff moving for partial summary judgment on the issue of liability in a breach of contract claim initially must "show" only that there is no genuine issue of fact regarding the liability elements of its claim. Just as a plaintiff need not disprove an affirmative defense in the plaintiff's initial portion of presenting evidence at trial, a plaintiff/movant need not anticipate and raise the non-movant's affirmative defenses. Harper v. Delaware Valley Broadcasters, Inc., 743 F.Supp. 1076, 1090 (D.Del.1990), aff'd, 932 F.2d 959 (3rd Cir. 1991). At any stage of a proceeding, the defendant bears the burden of raising and proving its affirmative defenses.

Thus, a defendant must support its affirmative defenses in the response to a plaintiff's motion for summary judgment. Stop-N-Go cannot shift the burden to plaintiff both to raise and argue against Stop-N-Go's own affirmative defenses. Stop-N-Go seemed to argue that its pleaded affirmative defenses survived the judgment on liability because Plaintiff did not argue about the affirmative

> defenses in Plaintiff's Memorandum in Support of Partial Summary Judgment. As stated above, given the scope of a judgment on the issue of liability, it is illogical to imagine in what kind of legal "limbo" holds "unargued" affirmative defenses after a judgment on liability issues. This court knows of no authority for holding that affirmative defenses are somehow latent and survive a partial summary judgment to be argued at trial - even though the complete issue of liability has been determined. Stop-N-Go ought to have raised the affirmative defenses in its Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment. Stop-N-Go's failure to do this cannot work to its advantage to preserve the defenses merely because it failed to support them.

Id. at 1167-68. In light of the foregoing, the court finds no merit in Rodger McAfee's contention that the United States failed to give him adequate notice as to what he had to present to oppose its motion for summary judgment on the issue of liability.

Rodger McAfee's Objections

Rodger McAfee makes two main contentions in his opposition to the findings and recommendations. First, Rodger McAfee contends that the findings and recommendations improperly made credibility determinations and weigh the evidence, rather than simply determining whether genuine issues of fact exist when considering the evidence in the light most favorable to the non-moving party. Second, Rodger McAfee contends that the findings and recommendations misapply the "one action rule" to the United States' conduct.

In regard to his first contention, Rodger McAfee cites three specific findings. First, Rodger McAfee objects to the Magistrate Judge's finding that Rodger McAfee knew, "prior to the execution of the loan," about the risks involved in the water well project because the loan was "initially denied at the Local Committee level." Findings and Recommendation, 8:24-9: 1. In support of this finding, the Magistrate Judge cites Defendant's Disputed Fact

number 12, which states as follows:

> 12. The McAfee's initial loan application was denied based on the determination by the local FmHA committee that Mr. McAfee's farming project would fail because of his lack of experience and managerial competence, as well as the unlikelihood of anyone successfully farming the McAfee property.

Rodger McAffee argues that this evidence does not support the conclusion that he knew of the risks involved in digging new wells, especially because he disagreed with the Local Committee's decision regarding the loan application. Rodger McAfee further argues that this finding is based on the court's inference in favor of the moving party, that Rodger McAfee understood the risks of the project.

The paragraph of the findings and recommendations containing the language to which Rodger McAfee objects provides as follows:

> The Court clarifies that the Court finds no argument on behalf of McAfee that the United States should be estopped based upon any conduct prior to the execution of the loan. As noted by the United States at oral argument, McAfee knew at that juncture of the risks involved in the water well project given the loan was initially denied at the Local Committee level. Def. Fact 12. Accordingly, as to any conduct by the United States prior to the execution of the loan, McAfee fails to meet the third (McAfee's ignorance) and fourth (reliance) elements of estoppel.

Findings and Recommendations, 8:22 - 9:4.

The court notes at the outset that Rodger McAfee has not disputed the Magistrate Judge's finding that McAfee did not argue that the United States should be estopped based upon any conduct prior to the execution of the loan. Further, the court finds nothing

in Rodger McAfee's opposition to the motion for summary judgment indicating that McAfee made such an argument. Furthermore, the court finds that the Magistrate Judge correctly concluded that the evidence presented in Defendant's Disputed Fact number 12 demonstrates the Rodger McAfee knew, prior to the execution of the loan, about the risks involved in the water well project. Finally, the court finds that no genuine issue of material fact exists as to whether Rodger McAfee had this knowledge. Therefore, the court concludes that Rodger McAfee's objection to the Magistrate Judge's finding that McAfee knew, "prior to the execution of the loan," about the risks involved in the water well project because the loan was "initially denied at the Local Committee level" provides no basis for rejecting the Magistrate Judge's findings and recommendations.

As the basis of his second objection, Rodger McAfee claims that, "[t]he Findings and Recommendations discount McAfee's statement that he was "kept in the dark" by plaintiff when it did not provide him with copies of Hofmann's reports." Rodger McAfee further claims that this rejection was based on the Magistrate Judge's finding that Mr. Hofmann's letters were "repetitive of what all parties were aware of prior to the initiation of the project, to writ: there was no guarantee of the well drilling project, the project was risky." Findings and Recommendations. 12:24 - 13:1. Rodger McAfee disputes this finding, arguing that Mr. Hofmann's report states nothing about the generalized riskiness of the well drilling project.

As set forth by the Magistrate Judge, Rodger McAfee's contention regarding the United States' failure to provide him with information it had was as follows:

> The UNITED STATES knew facts it did not share with the McAFEE's. [sic] It continued to expend loan proceeds and counter-signed checks from the supervised account for drilling dry holes. Mr. McAfee ... was kept in the dark about the Government's dire assessment of the well drilling project. His continued reliance on the

> Government's assurances resulted in his borrowing millions of dollars that his farming operation could never repay.
>
> Opp. P & a 10:14-21. The Court notes that this paragraph is pure rhetoric insofar as it is unsupported in either McAfee's Declaration or other documents.
>
> At oral argument, McAfee clarified that the above alleged facts regarding what the United States knew of but did not share with McAfee is found in a letter dated Dec. 26, 1978 (Davidson Decl. Exh. F), and a letter dated Jan. 17, 1997 (Davidson Decl. Exh. H), both by FmHA State Engineer Erwin Hofmann. With regard to the Dec. 26 letter, McAfee cites to Hofmann's recommendation: "A contingency of 10 percent or more should be provided to allow for unknown and variable well construction costs." With regard to the Jan. 17 letter, McAfee cites to Hofmann's finding that "[t]here appears insufficient FmHA emergency funds to ... [d]evelop and test pump five out of eight new wells to be drilled" et al. Of the four items set forth by Hofmann of which there were insufficient funds, Hofmann further opined: "We consider the above items strongly necessary for the soundness of this FmHA loan." [Emphasis in the original.]

Findings and Recommendations, 96:7 - 10:3.

In analyzing McAfee's contention, the Magistrate Judge held in part as follows:

> McAfee cites to the letters of FmHA State Engineer Hofmann to show that the United States knew of the fact that the well drilling project assessment was dire. Oppo. P & A 10:14-19. The Court has reviewed Hofmann's letters and finds them to be repetitive of what all parties were aware of prior to the initiation of the project, to wit: there was no guarantee of the well drilling project, the project was risky. Further, while Hofmann made four specific recommendations in his Jan. 17 letter (test pump

> new wells, provide extra pipe, provide extra power lines, provide for concrete slabs), there is no evidence whether or not these four recommendations were followed and there is no evidence that the failure of the project was related to these four recommendations. McAfee otherwise argues, contrary to whatever argument he hinges upon the Hofmann letters, that the failure of the project was due to not drilling the wells deep enough. Oppo. P & A 12:19-20. Hofmann makes no reference to this in his letters. Accordingly, the Court finds the Hofmann letters to be of marginal weight.

Findings and Recommendations, 12:21 - 13:11.

Upon de novo review, the court finds first that Rodger McAfee mischaracterizes the Magistrate Judge's rejection of his claim that he was "kept in the dark" by the United States when he claims that her rejection "was based" on her conclusion regarding the letters of FmHA State Engineer Erwin Hoffman. The Magistrate Judge also discussed and relied on the change in Rodger McAfee's argument from what he originally argued in his First Amended Answer and eight separate undisputed facts, which McAfee ignored in making his argument. Moreover, the court finds that the Magistrate Judge correctly concluded that Hofmann's reports confirmed what was already known to all parties: that there was no guarantee of the well drilling project and that it was risky. Finally, the court finds that Rodger McAfee failed to demonstrate the existence of a genuine issue of material fact regarding his knowledge regarding the uncertainty of success on the project.

The third factual finding which Rodger McAfee objects to is the Magistrate Judge's finding that Hofmann's letters of "marginal weight," in the paragraph quoted. McAfee contends that this constitutes "impermissible weighing of the evidence," citing Mitsushita Elec. Indus. Co., 475 U.S. 574. 587. The court finds that this portion of the Mitsushita opinion contains no reference to weighing of the evidence, but does contain a statement of the principle that on summary judgment the inferences to be drawn

from the underlying facts must be viewed in the light most favorable to the party opposing the motion.

Relatedly, Rodger McAfee contends that in analyzing the evidence regarding the Hofmann letter's and McAfee awareness of the riskiness of the loan, the Magistrate Judge failed to determine whether there was any genuine issue of material fact, after considering the evidence in the light most favorable to the non-moving party. Rodger McAfee argues that "a jury might consider the evidence differently. A jury might believe that plaintiff's continued expenditure of McAFEE's loan proceeds - in disregard of the Hofmann reports and without even making such reports available to McAFEE - was highly improper." Defendant's Opinion, 5:13-17.

While the Magistrate Judge's reference to "weight" may have been unfortunate, this court agrees with the conclusion of the Magistrate Judge quoted by Rodger McAfee in his objections and found at page 14 line 21 through page 15 line 11 of the findings and recommendations. This court finds no merit to Rodger McAfee's claim that this conclusion contains an improper inference in favor of the moving party. Further, in light of the undisputed facts set forth at page 11 line 1 through page 12 line 9, the court concludes Rodger McAfee failed to demonstrate the existence of a genuine issue of material fact in regard to Hofmann's letters such as would preclude summary judgment.

The One Action Rule

As his second main contention in regard to the Magistrate Judge's findings and recommendations, Rodger McAfee contends that the findings and recommendations misapply the "one action rule," set forth in California Civil Procedure Code § 726, to the United States' conduct.

> Pursuant to California Civil Procedure Code § 726, a creditor may only recover from a debtor's personal estate by first foreclosing on the property pledged as security for the loan and then recovering a deficiency judgment for

the difference between the amount due on the note and proceeds for the sale of the property. Winklemen v. Sides, 31 Cal. App.2d 387, 88 P.2d 147 (1939). The security becomes the primary funds from which the debt is satisfied. Under § 726, the security must be exhausted before the creditor recovers on the underlying obligation. As a result, § 726 is both a security - first rule and a one-action rule.

The relevant text of § 726 provides:
(a) There can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property or an estate for years therein, which action shall be in accordance with the provisions of this chapter.

The California Supreme Court has determined that § 726 was intended to prevent multiplicity of actions against the debtor, to compel the exhaustion of all security before entry of a deficiency judgment, and to requite the debtor to be credited with the fair market value of the secured property before being subjected to personal liability. Walker v. Community Bank, 10 Cal.3d 729, 111 Cal.Rptr. 897, 518 P.2d 329 (1974). The statute is unambiguous in its attempt to force the creditor to pursue foreclosure against the collateral pledged as security on a note, instead of attempting to hold the debtor personally liable.

In Re Pajaro Dunes Rental Agency v. Spitters, 156 B.R, 263, 266 (N.D. Cal. 1993).

Rodger McAfee first disputes the Magistrate Judge's finding that insofar as the United States has pledged not to proceed in a personal action against the debtor, the United States has not violated § 726. Rodger McAfee argues that a promise not to seek a deficiency judgment after foreclosure, however, is irrelevant to whether or not a party has violated the one action rule, citing Crisman v. Lanterman, 149 Cal. 647, 651 (1906).

The court rejects Rodger McAfee's argument. As discussed in the above-quoted language from In Re Pajaro Dunes Rental Agency and also in Crisman v. Lanterman, 149 Cal. at 651, under § 726, "[t]he land is thus primarily liable for the payment of the obligation, and the mortgagor can be called on to pay only where the proceeds of a sale of land are insufficient." As the Magistrate Judge correctly found, the United States' pledge that it will not seek a personal judgment against the debtor, while not determinative on the entire issue of the one action rule, does show that the United States has not now violated the rule by attempting to seek a personal judgment against Rodger McAfee.

Rodger McAfee next claims that the Findings and Recommendations conclude that the United States' acceptance of the children's $500,000 note in exchange for releasing the deed of trust against the Kerman property violated the one action rule. This is incorrect. The relevant portion of the Findings and Recommendations provides as follows:

> Insofar as McAfee contends the United States' accepting $500,000 in exchange for releasing its security interest in the Kerman Property (see Def. Fact 38) triggers the one action permitted in § 726, the Court finds that this has only triggered the one action related to the original security interest in the Kerman property. That has nothing to do with the security interest(s) that the United States holds in the El Nino property and has nothing to do with the subsequent promissory note executed by the McAfee Children secured by a subsequent security interest in the Kerman property.

Findings and Recommendations, 18:22 - 19:5. This court concludes that under this language, the Magistrate Judge did not find the United States' acceptance of the $500,000.00 note violated the one action rule. Rather, the Magistrate Judge found that the acceptance of the note "triggered" the one action rule as to the original security interest in the Kerman property, such that further actions as to that interest could constitute a violation of the rule.

Finally, Rodger McAfee objects to the finding by the Magistrate Judge that there were five separate loans secured by three different deeds of trust, such that "even if the one action rule applies, it would only bar the instant action as to one of those loans." Findings and Recommendations, 19:5-9. Rodger McAfee argues as follows:

> Four of the five loans, however, were cross-collateralized. (Exhibit "G" to Complaint for Foreclosure.) The only note that was not cross-collateralized was loan number 43-01 in the amount of $442,980.00 of which only $246,230.00 had been expended. And that note was paid in full as a result of the offset. All of the other loans were cross-collateralized, and they were all partially reduced by the offset. (Davidson declaration, Exhibit "V").

Rodger McAfee argues that when a single debt is secured by more than one trust deed, a creditor must foreclose all of his security in a single action, or liens which are not foreclosed are deemed to be waived, and the property which is foreclosed is free and clear of the lien. See Newhall v. Bank of Livermore, 136 Cal 533, 536-37 (1902), quoting Stockton Sav. And Loan Society v. Harrold, 127 Cal. 612 (1900). The court finds these cases distinguishable because, in the present action, the United States did not bring foreclosure action against the Kerman property.

Rodger McAfee complains that instead of foreclosing against the security, the United States offset his debt by an amount which it concluded was the "foreclosure value" of the Kerman property and did so in return for a new deed of trust on the same property. Rodger McAfee argues:

> Plaintiff could not unilaterally offset the loan balances by such action and retain its security interest in the remaining deeds of trust. Its sole and exclusive remedy was foreclosure. By not foreclosing, by filing a complaint in intervention, and by concluding a settlement of its intervention action that had the effect of off-setting McAFEE 's secured notes, Plaintiff clearly and unavoidable violated

> CCP Section 726 and the one action rule. The consequence of such a violation is black letter law: loss of the security.

Defendant's Objections, 7:19-28. Rodger McAfee claims that by proceeding in this manner, the United States in essence did exactly what the California Supreme Court held, in Security Pacific National Bank v. Wozab, 51 Cal. 991, 997-99 (1990) that a creditor could not do.

In Security Pacific National Bank, a bank that was owed a debt secured by a deed of trust on the debtor's property, set off cash in the debtor's demand deposit accounts in partial satisfaction of the debt. When the debtors contended that the bank was first required to foreclose its security interest, the bank reconveyed the deed of trust and then filed suit to collect the remainder of its debt. The bank did not bring a foreclosure action, but rather alleged breach of the property owners' personal guarantees, which had become unsecured as a result of the bank's reconveyance. The bank sought to recover the unpaid debt of approximately $976,000.

The California Supreme Court held that the bank's setoff was a violation of Section 726 not because it was an "action," but because the security had not first been foreclosed. Specifically the setoff violated the requirement of Section 726 and the statutory section of which it is a part that a secured creditor must proceed against the security before enforcing the underlying debt. The court concluded, however, that the improper setoff did not result in a forfeiture of the underlying debt, even though it constituted a waiver of the bank's security interest.

The court stated as follows:

> We are therefore confronted with an issue of first impression: Does an improper bank setoff result in the forfeiture of the underlying debt? We conclude there is no forfeiture. When a secured creditor sues only on the underlying debt without seeking to foreclose the security,

he is precluded by section 726(a) from proceeding against the security in a subsequent action. (Salter v. Ulrick (1943) 22 Cal.2d 263, 268 [138 P.2d 7, 146 A.L.R. 1344].) The creditor is deemed to have waived his security. [FN9] The judgment on the debt, however, is unaffected by the creditor's failure to comply with the chronology required by section 726. (22 Cal.2d at p. 268.) Similarly, if a creditor has multiple security interests for a debt and proceeds against less than all of them in a judicial foreclosure action, in which he obtains a deficiency judgment, he cannot thereafter seek to foreclose the excluded security. (Walker v. Community Bank, supra, 10 Cal.3d 729, 733-734.) In that situation, however, the creditor also has a judgment on the underlying debt.

FN9 The debtor, of course, can raise the security as an affirmative defense in the action on the debt. If the debtor does so, the creditor will be required to proceed first against the security. (Pp. 997-998, ante.)

In this case, the bank's setoff was not a judicial action, and the bank, therefore did not obtain judgment for the full amount of the debt (as in Salter v. Ulrich, supra, 22 Cal.2d 263) or for any deficiency after sale of the security (as in Walker v. Community Bank, supra, 10 Cal.3d 729). In both Salter and Walker the creditors failed to comply fully with section 726, but in both cases the creditors were allowed a judgment for the full amount of the debt. The only sanction was that the creditors lost their preferred position as secured creditors (in whole or in part) and were reduced to the status of unsecured creditors - a drastic sanction in the marketplace. (Barnhardt, Mortgages and Deeds of Trust (Cont.Ed.Bar. 1989) 12 Real Prop. L. Rptr. 184, 186.) (7c) By parity of reasoning, the bank in this case also must be allowed to seek a judgment for the full balance of the debt.

Security Pacific National Bank, 51 Cal.3d at 1004.

In its reply to Rodger McAfee's objections, the United States relies on the language from In Re Pajaro Dunes Rental Agency, 156 B.T. at 266, quoted above, that "The California Supreme Court has determined that § 726 was intended to prevent multiplicity of actions against the debtor, to compel the exhaustion of all security before entry of a deficiency judgment, and to require the debtor to be credited with the fair market value of the secured property before being subjected to personal liability." The United States argues that in the present case, the three elements established by the California Supreme Court have been met by the United States in its non-violation of the one action rule.

First, the United States argues that there is no multiplicity of actions against debtor Rodger McAfee. The United States argues that Mark L. McAfee, Eric A. McAfee, Adam M. McAfee, and Andrew M. McAfee (the McAfees") brought an action entitled Mark L. McAfee, et al. v. Rodger L. McAfee, et al., and numbered 71538. In that action, the McAfees claimed that the deed of trust executed in favor of the United States to secure the debt owed by Rodger McAfee and Darlene McAfee of FSA did not validly encumber the Kerman property owned by them. The United States intervened in the action and accepted a promissory note for $500,000.00 executed by the McAfees for a release of the United States' security interest in the Kerman Property. The United States argues, therefore, that there is no multiplicity of actions filed by the United States and that there is only one pending action for foreclosure filed by the United States in district court against Rodger L. McAfee.

Secondly, the United States argues that it did not obtain any judgment against Rodger McAfee in the action entitled Mark L. McAfee, et al. v. Rodger L. McAfee, et al., but rather obtained a settlement which released the Kerman property. The United States argues that in the present action it is seeking to exhaust all its security and has expressly waived any right to a deficiency judgment against Rodger McAfee. The United States concludes that it thus has not violated the one action rule by obtaining a

judgment on the note and then seeking to foreclose upon its security.

Third, the United States argues that it has not violated the requirement that the debtor be credited with the fair market value of the secured property before being subjected to personal liability. Specifically, the United States claims that at the time the new loan was established with the McAfees, evidenced by the promissory note for $500,000.00, FmHA credited the amount of $568,266.35 to the loan account of Rodger McAfee. The United States concludes that Rodger McAfee was therefore credited with the fair market value of the secured property in compliance with the purposes of Section 726.

In addition to contending that it has met the three elements established by the California Supreme Court in In Re Pajaro Dunes Rental Agency, the United States contends that it did not violate the one action rule because it did not previously bring an "action" as defined by California Code of Civil Procedure § 22 to prosecute its rights or collect its debts against Rodger McAfee. The United States argues that it intervened in Mark L. McAfee, et al. v. Rodger L. McAfee, et al. after the McAfees initiated the action in Superior Court. The settlement between the McAfees, Darlene M. McAfee and the United States was made in that action. Section 22 of the California Code of Civil Procedure provides as follows:

> An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.

The United States argues that it was the McAfees who brought the civil action, which resulted in the settlement between the McAfees, Darlene M. McAfee and the United States. The United States concludes that the one action rule is not applicable to it, because the United States did not bring an action, as defined in Section 22, which resulted in the release of the Kerman property. Rather, it only intervened in an action brought by the

McAfees. Further, in the present case, the United States does not seek any deficiency judgment against Defendants.

After reviewing the arguments of the parties, the court finds that the decisions Newhall v. Bank of Livermore, 136 Cal. 533, 536-37 (1902), and Stockton Sav. and Loan Society v. Harrold, 127 Cal. 612 (1900) are distinguishable, because in the present action, the United States did not bring a foreclosure action against the Kerman property. The court further finds that the present case is distinguishable from Security Pacific National Bank on two bases. First, the present case does not involve the unique area of the law addressed in Security Pacific National Bank of bank setoffs. Secondly, and most importantly, the "security first" portion of the one action rule provides that a secured creditor must proceed against the security before seeking to enforce the underlying debt through a deficiency judgment. See In Re Pajaro Dunes Rental Agency, 156 B.R. at 266; Security Pacific National Bank, 51 Cal.3d at 999. In the present case, the United States has not sought to enforce Rodger McAfee's underlying debt through a deficiency action. Thus, the United States has not violated the purpose of Section 726 as defined by the California Supreme Court in In Re Pajaro Dunes Rental Agency.

Further, the court finds that, as argued by the United States, there has been no multiplicity of actions against Rodger McAfee and that the United States did not obtain a judgment against Rodger McAfee in the previous action of Mark L. McAfee, et al. v. Rodger L. McAfee, et al., no. 71538. Thus, the court finds that the first two purposes of Section 726 as explained by the California Supreme Court in In Re Pajaro Dunes Rental Agency have not been violated. Finally, the court finds that the third requirement under In Re Pajaro Dunes Rental Agency that the debtor be credited with the fair market value of the secured property before being subjected to personal liability is inapplicable to the present case, because Rodger McAfee has not been subjected to personal liability in this action. Accordingly, the court concludes it is unnecessary to determine whether Rodger McAfee was credited with the fair market value of the Kerman property.

On June 1, 2000 Rodger McAfee filed a document entitled

Objections and Request to Strike Plaintiff's Brief Or, Alternatively, For Leave To File A Responsive Brief. Defendant McAfee argues that the Magistrate Judge's Findings and Recommendations did not provide for the filing of replies to the objections of an opposing party, and that the reply should therefore be stricken. Rodger McAfee is incorrect. The Magistrate Judge's Finding and Objections expressly provided, "Replies to the objections shall be served and filed within ten (10) court days (plus three days if served by mail) after service of such objections." Findings and Recommendations, 21:13 - 15. Accordingly, Rodger McAfee's request to strike the United States reply' is HEREBY DENIED.

Rodger McAfee also contends that the United States' reply contains "new factual and legal theories that had not previously been presented to Magistrate Judge Snyder; that were not responsive to McAfee's Objections; and are clearly wrong." The court finds that the arguments made in the United States' reply are responsive to those made in Rodger McAfee's objections and are in no way improper. Rodger McAfee's request to file a responsive brief to the United States' rely is HEREBY DENIED.

ORDER

In light of the foregoing, IT IS HEREBY ORDERED that:
1) The Magistrate Judge's findings and recommendations entered April 21, 2000, are ADOPTED as described above; and
2) The United States' motion for summary judgment is GRANTED and the United States is g ranted summary judgment on its entire complaint for judicial foreclosure.

DATED: _____

_____
ANTHONY W. ISHII
UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 00-17334
Plaintiff-Appellee,	D.C. No. CV-96-05720-AWI
v.	MEMORANDUM
RODGER L. MCAFEE,	
Defendant-Appellant.	

Appeal from the United States District Court
For the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Argued and Submitted June 13, 2002
San Francisco, California

Before: LAY,** THOMPSON and TALLMAN, Circuit Judges.

Rodger L. McAfee appeals from summary judgment in the Government's

---

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3

**The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

foreclosure action against his property in El Nido, California. The district court found that the Government's suit did not violate California's "one action rule" and that McAfee was not entitled to equitable estoppel or an offset for negligence. We affirm.

Facts

McAfee and his wife purchase 1480 acres of California farmland in 1976. In the following months, the area suffered severe drought and the strata under McAfee's land shifted. The six wells on his property failed. To continue farming operations, McAfee determined to recondition the existing wells and drill three additional wells. McAfee initially sought private financing but was denied six times due to "questionable water availability."

McAfee turned to the United States Farmers Home Administration (FmHA) for an emergency farm loan. Local FmHA officials denied his initial request, noting the property's lack of a proven production history and anticipated low harvest size and high water costs. On administrative appeal, McAfee's application was approved. McAfee received five loans totaling $2,075,980. The loans were secured by McAfee's El Nido and Kerman properties. McAfee used $1.24 million to pay off existing debt and approximately $180,000 for his drilling project.

McAfee approached The Water Development Company, which agreed to perform the work. Water Development was unable to recondition the existing wells, however, and Water Development, McAfee, and the FmHA agreed that nine new wells would have to be dug. McAfee determined, in light of his need for financing, that the new wells should drill to 600 feet.[1] When the first well was dug, however, it was discovered that water was unavailable at 600 feet. Water Development opined that water would be available below 600 feet or at 420 feet, after a test well at the lesser depth produced 1300 gallons/minute, an amount suf-

[1] It was generally agreed by the parties that drilling to 1000 feet would have likely doubled the cost of the project.

ficient to satisfy McAfee's needs. The local FmHA official recommended the lesser depth in light of the limited funding available. McAfee agreed. Water Development drilled the wells between November 27, 1978, and February 18, 1979. In January 1979, McAfee suffered an emotional breakdown and was uninvolved in the drilling process thereafter.

McAfee's wells failed to produce sufficient water. His farming operation failed. McAfee failed to make principal or interest payments after August 1979. In June 1996, the FmHA sued to foreclose on McAfee's security, including the El Nido land and farm related personality. The FmHA did not seek a deficiency judgment against McAfee personally. The district court granted summary judgment to the Government. McAfee timely appealed. We review de novo the district court's grant of summary judgment. Shalit v. Coppe, 182 F.3d 1124, 1126-27 (9th Cir. 1999).

I. One-Action Rule

In 1983, McAfee's children sued McAfee for wrongfully encumbering the Kerman property, which had been held in trust for the children at the time McAfee pledged the property as collateral. The United States intervened to protect its interest in the Kerman property. Ultimately, the children settled with the Government. The children gave the Government a $500,000 promissory note secured by the Kerman property. The Government set up a new loan account for the children and credited McAfee's loan account in the amount of $568.266; the fair market value of the property at the time. McAfee asserts the Government's intervention constitutes an "action," and the settlement a "setoff" against his debt, such that the Government's decision not to institute foreclosure proceedings at that time precludes foreclosure now under California's "one-action rule."

The California Code of Civil Procedure provides: "There can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property." Cal. Civ. Pro. Code § 726 (2002). In effect, this rule requires a creditor whose debt is secured by a mortgage deed or real prop-

erty to proceed against the security before seeking a personal judgment against the debtor. In re DiSalvo, 219 F.3d 1035, 1038 (9th Cir. 2000). Moreover, a creditor who seeks a setoff of the mortgaged debt without first proceeding against the property in a foreclosure action loses its lien on the property held as security. Sec. Pac. Nat'l Bank v. Wozab, 51 Cal.3d 991, 997 (1990). The purpose of the rule is to "prevent multiplicity of actions, to compel exhaustion of all security before entry of a deficiency judgment and to require the debtor to be credited with the fair market value of the secured property before being subjected to personal liability." Walker v. Community Bank, 10 Cal.3d 29, 736 (1974).

The district court rejected McAfee's argument. We agree. The text of the statute was not satisfied. The Government's intervention in the existing suit was not an "action" by the Government "for the recovery of a debt." In seeking to protect its interests against McAfee's children, the Government was not proceeding against McAfee with the purpose of prosecuting its rights against him. Wozab, 51 Cal.3d at 998. In addition, the settlement between McAfee's children and the Government was not a "setoff" against McAfee. A setoff is an "extrajudicial appropriation of the debtor's assets before foreclosure." Id. at 999 (citing McKean v. German-Am. Sav. Bank, 118 Cal. 334, 340-41 (1897)) (emphasis in original). In this case, there was no "extrajudicial appropriation;" rather, there was a settlement of a judicial action. Nor did the Government "appropriate" the debtor's asset; rather the Government reached an agreement to extinguish the children's rights against the security.

The Government also did not violate the purpose of the law. This is the first and only action by the Government against the property; there has been no multiplicity of actions. Likewise, the Government seeks no default judgment against McAfee. Only the security will be exhausted, and there is no risk of McAfee suffering personal liability. The "one-action rule" does not bar these foreclosure proceedings.

II. Equitable Estoppel

In the alternative, McAfee asserts he is entitled to equitable estoppel against the Government's foreclosure action.

Initially, the Government argues McAfee is barred from asserting equitable estoppel on the grounds that public money is effectively at stake in this foreclosure action. See Office of Pers. Mgmt. V. Richmond, 496 U.S. 414, 427 (1990). McAfee disagrees. He asserts his estoppel argument is "defensive," whereas Richmond only prohibits the "offensive" use of equitable estoppel against the Government in cases involving public funds. We recognized this distinction between offensive and defensive estoppel in United States v. Hatcher, 922 F.2d 1402, 1410 (9th Cir. 1991). There we recognize that Richmond applies where at issue is the "payment of money from the Public Treasury." Id. We held, however, that mere "negative impact on the public fisc ... alone does not suffice to implicate the rule announced in Richmond." Id. In doing so, we distinguished United States v. Fowler, 913 F.2d 1382, 1385-86 (6th Cir. 1990), where we held that a party could not use equitable estoppel to prevent the Government from reclaiming wrongly dispersed public funds. We held in Hatcher that, absent that unique circumstance, a party is not barred from using equitable estoppel against the Government defensively, but may only invoke the doctrine if he satisfies a two-prong threshold test. 922 F.2d at 1410. Here, McAfee's use of equitable estoppel, if successful, certainly would have a significant negative impact on the public fisc. It would not, however, require a payment of money from the public treasury. Thus, McAfee is not barred from using equitable estoppel defensively. We turn, then, to consider whether he can satisfy the threshold requirements.

A claimant who seeks to estop the Government must satisfy two threshold showings before the court will engage in the traditional estoppel analysis. First, the claimant must show that the Government engaged in affirmative misconduct beyond mere negligence. Watkins v. United States Army, 875 F.2d 699, 707 (9th Cir. 1989). Second, the claimant must show that the Government's affirmative misconduct will cause a serious injustice, and the public's interest will not suffer undue damage. Id. We hold McAfee cannot satisfy the threshold requirements.

A. Affirmative Misconduct

McAfee asserts the Government engaged in affirmative misconduct by insisting on 420 foot wells when it was determined that water was unavailable at 600 feet. McAfee assets local FmHA officials knew that 420-foot wells would provide insufficient water and recklessly spent loan funds on the project in order to cause his farm to fail. He relies primarily on two letters from Erwin Hofmann of the California FmHA office to support his claim. Hofmann expressed concern about maintaining funding sufficient to assure "acceptable well construction standards." McAfee argued to the district court that Hofmann's "concern [] about the construction specifications, [] could have included well depth."

The district court properly found this claim untenable. It was not apparent prior to drilling the several wells to 420 feet that such wells would fail. A test well at 420 feet had produced 1300 gallons/minute. There certainly was a higher risk of failure at 420 feet rather than 1000 or more feet, but legitimate financial constraints precluded deeper wells. In any event, McAfee - who held himself out as knowledgeable concerning wells - was aware of the risks involved and agreed to drill to 420 feet based on the same information available to the Government. Hofmann's letters provide no evidence to the contrary; the letters were sent after drilling had started and, in any event, McAfee's argument that Hofmann's concerns "could have" included depth was mere speculation, not a reasonable inference drawn from evidence.

McAfee also implies that the Government's silent possession of the information and opinion in Hofmann's letters amounted to affirmative misconduct. The district court found that Hofmann's letters only "confirmed what was already known to all parties: that [there] was no guarantee of the well drilling project and that it was risky." We are not persuaded this reasoning was error in light of McAfee's statements that he was well versed in the well drilling process and the collaborative nature of the project planning.

B. Serious Injustice Without Public Harm

There existed no clear evidence of "serious injustice" in light of the disastrous financial circumstances McAfee faced prior to the FmHA loan. On the verge of bankruptcy and the then-likely loss of his farm, McAfee used far more of his loan money to pay existing debts than he used to pursue his drilling project. Although that project failed, the FmHA loan allowed him to maintain ownership of his property nearly twenty years longer than would otherwise have been the case.

More important, however, is the fact that estopping the Government's foreclosure action would cause serious public harm. The Government notes that if estoppel is applied, it will have no recourses against McAfee's now $5 million debt to the public fisc. In United States v. Omdahl, 104 F.3d 1143, 1146 (9th Cir. 1997), we found that the loss of $240,000 in principal in addition to interest would constitute an unacceptable public burden. Clearly, loss of over $2 million in principal must also be considered an undue burden. We agree with the district court; McAfee is not entitled to equitable estoppel.

III. Offset for Negligence

We also affirm the district court's decision to deny McAfee an offset for negligence under the discretionary function exception to the Federal Tort Claims Act. The Government is insulated from tort claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function ... whether or not the discretion involved be abused." 28 U.S.C. § 2680(A) (2002). Section 2680(a) mandates dismissal of a claim if "the challenged actions involve 'an element of judgment or choice.'" Valdez v. United States, 56 F.3d 1177, 1179 (9th Cir. 1995) (quoting United States v. Gaubert, 499 U.S. 315, 322 (1991)).
Specifically, a claim will be dismissed if: (1) no "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," or (2) the government employee's decision is "grounded in social, economic, and political policy." Blackburn v. United States, 100 F.3d 1426, 1429 (9th Cir. 1996)

(emphasis added) (internal citations omitted).

The local FmHA officials' conduct satisfies both criteria for discretionary actions. There is no statute, regulation, or policy that mandates specific conduct on the part of local FmHA officials. Although officials are required to provide supervision to borrowers if necessary to achieve the purposes of the loan and protect the Government's interest, see 7 C.F.R. § 1804.3(f)(1978), officials are given wide discretion in their exercise of that authority. See 7 U.S.C. § 1961(c) (1978) (Secretary of Agriculture should "conduct the emergency loan program ... in a manner that will foster and encourage the family farm system of agriculture."); 7 C.F.R. § 1804.3(f) (1978) (Borrower is responsible for "[p]lanning construction and land development and obtaining technical services in connection with plans, specifications, and cost estimates ... with such assistance from the County Supervisor as may be necessary for the County Supervisor to be sure that the development is properly planned."). Indeed, to the extent local officials are guided by directives to protect both the farmer's and the Government's financial interests, actions pursuant to those broad directives must also be considered "grounded in economic policy." Cf. Williamson v. United States Dep't of Agric., 815 F.2d 368, 376 (5th Cir. 1987); Pennbank v. United States, 779 F.2d 175, 180 (3d Cir. 1985); Ortiz v. United States, 661 F.2d 826, 831 (10th Cir. 1981). Consequently, McAfee is not entitled to any offset for alleged Government negligence.

Judgment AFFIRMED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	**D.C. No. CV- 96-5720 AWI**
Plaintiff,	ORDER
v.	
RODGER L. MCAFEE, et al.,	
Defendants	

Before: LAY,* THOMPSON and TALLMAN, Circuit Judges.

Appellant's petition for rehearing is denied.

*The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.